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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT L. AYERS, Warden,, *Petitioner,*

v.

JACKSON CHAMBERS DANIELS, , *Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

**Page**

INTRODUCTION 1

A. Certiorari Must Be Granted To Resolve The Conflict Created By The Ninth Circuit's Subjective Standard For Finding An Irreconcilable Conflict And It Presumption Of Prejudice Based On Such A Conflict 2

B. Certiorari Must Be Granted To Resolve The Conflict Among The Circuit Courts Regarding When Defense Counsel May Rely On The Opinions Of Mental Health Experts When Formulating Their Defense Strategy 4

C. Certiorari Must Be Granted To Prevent The Ninth Circuit's Erosion Of This Court's Decisions In *Murphy v. Florida* And *Brown v. Sanders* Concerning Venue And Invalid Sentencing Factors 8

CONCLUSION 10

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| **Cases** | |
| *Brown v. Sanders*<br>546 U.S. 212 (2006) | 8 |
| *Burger v. Kemp*<br>483 U.S. 776 (1987) | 5 |
| *Morris v. Slappy*<br>461 U.S. 1 (1983) | 2 |
| *Perry v. Leeke*<br>488 U.S. 272 (1989) | 3 |
| *Plumlee v. Papa*<br>465 F.3d 910 (9th Cir. 2006) | 3 |
| *Poyner v. Murray*<br>964 F.2d 1404 (4th Cir. 1992) | 6 |
| *Rompilla v. Beard*<br>545 U.S. 374 (2005) | 6 |
| *Six v. Delo*<br>94 F.3d 469 (8th Cir. 1996) | 6 |
| *Strickland v. Washington*<br>466 U.S. 674 (1984) | 3 |
| *United States v. Cronic*<br>466 U.S. 648 (1984) | 3 |

## TABLE OF AUTHORITIES (continued)


| | Page |
|---|---|
| *Walls v. Bowersox*<br>151 F.3d 827 (8th Cir. 1998) | 5 |
| *Wiggins v. Smith*<br>539 U.S. 510 (2003) | 6 |
| **Constitutional Provisions** | |
| United States Constitution<br>Sixth Amendment | 2, 5 |

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## INTRODUCTION

Petitioner respectfully submits this brief in reply to the Brief for the Respondent in Opposition. Daniels seeks to avoid certiorari by emphasizing the district court's "factual findings" and arguing that the Ninth Circuit's published decision is nothing more than the "application of precedent to a unique set of facts." Resp.'s Opp. at 9. As discussed below, Daniels's efforts to escape review are unavailing. Daniels's attempt to blend the Ninth Circuit's decision together with that of the district court only serves to highlight the flaws and inadequacies in the Ninth Circuit's decision. Contrary to Daniels's suggestions, there are no factual grounds for denying certiorari, and the Ninth Circuit's decision, which that court found worthy of publication, will breed nothing but confusion and uncertainty in future cases unless corrected by this Court.

### A. Certiorari Must Be Granted To Resolve The Conflict Created By The Ninth Circuit's Subjective Standard For Finding An Irreconcilable Conflict And Its Presumption Of Prejudice Based On Such A Conflict

The Ninth Circuit found a constructive denial of the right to counsel as a result of Daniels's unilateral refusal to cooperate because of his subjective (and paranoid) evaluation of his counsels's performance and the rulings of the trial court. To make matters worse, the Ninth Circuit presumed prejudice as a result of this "conflict," and also alternatively found that counsel were ineffective in failing to overcome Daniels's mistrust of them. In arguing against granting certiorari to resolve the conflict created by the Ninth Circuit's unprecedented decision, Daniels falls victim to the same reasoning plaguing the Ninth Circuit's decision. He tries to explain why he believed his attorneys were part of a conspiracy to kill him, and justify why he believed his dissatisfaction with the trial court's pre-trial rulings gave him license to refuse to cooperate. (Resp.'s Opp. at 17-19.) Daniels insists that the Ninth Circuit's decision does not run afoul of *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983) (Sixth Amendment does not guarantee a right to a meaningful attorney-client relationship), because, among other reasons, he "felt he had a factual basis for distrusting his appointed trial counsel . . . ." (Resp.'s Opp. at 20.)[1/] But Daniels's efforts to explain his actions fail to address the central problem with the Ninth

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1. Throughout his Opposition, Daniels states that trial counsel had no more than "three or four months before the trial began." *See, e.g.*, Opp. at 8. To the extent Daniels suggests that counsels' preparations for trial were limited to this period, he is mistaken. Carl Jordon was appointed as lead counsel on February 23, 1983. Motions and jury selection began four months later, on June 22, 1983. The jury, however, was not sworn until August 29, 1983; during this time, counsel continued to prepare for trial. Moreover, trial counsel also had the advantage of the ten months of preparation undertaken by the public defender's office before it was relieved.

Ci[illegible]t's decision: there is no basis for finding a conflict of int[illegible]t based on a defendant's subjective evaluation of his attorney's performance. *See United States v. Cronic*, 466 U.S. 648, 657 n. 21 (1984) ("If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance.").

Daniels insists that "The Ninth Circuit never concluded that [he] had the right to choose his counsel." (Resp.'s Opp. at 19.) Perhaps not explicitly. Such a conclusion, however, follows inexorably from the Ninth Circuit's new-found subjective standard. Under the Ninth Circuit's rule, a defendant who mistrusts his attorney will be able to waylay the proceedings until he is given an attorney with whom he is satisfied.

Further, Daniels is unable to marshal any reason, authority, or precedent to support the Ninth Circuit's conclusion that the "conflict" created by his refusal to cooperate obviated the need to show any prejudice. He makes a passing reference in his Statement of the Case to this Court's decisions in *Perry v. Leeke*, 488 U.S. 272, 278-79(1989) and *United States v. Cronic*, 466 U.S. at 659 n. 25. Resp.'s Opp. at 6. However, the general recognition in these cases of the principle that prejudice need not be shown "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding" *United States v. Cronic*, 466 U.S. at 659 n. 25, is far different from the conclusion that prejudice need not be shown where the defendant simply refuses to cooperate with counsel who were present at all times during trial. The Ninth Circuit's deletion of the prejudice requirement is, by itself, sufficient to render this issue worthy of certiorari. *See Plumlee v. Papa*, 465 F.3d 910, 943 (9th Cir. 2006) (Bea, J. dissenting) (noting this Court has not recognized "irreconcilable conflict" doctrine).

Finally, Daniels apparently does not attempt to defend the Ninth Circuit's alternative ruling that trial counsel provided ineffective assistance under *Strickland v. Washington*, 466 U.S.

674 (1984), by failing to resolve the "communication conflict" with their client. Pet. App. at 31a-33a. Instead, Daniels maintains the Ninth Circuit correctly found ineffective assistance of counsel based on defense counsels' failure to obtain portions of Daniels's medical, family, social, legal, and institutional history. (Resp.'s Opp. at 14-25.) As discussed below, because defense counsel properly relied on the opinions of two psychiatrists, counsel cannot be faulted for failing to further investigate potential mental defenses.

### B. Certiorari Must Be Granted To Resolve The Conflict Among The Circuit Courts Regarding When Defense Counsel May Rely On The Opinions Of Mental Health Experts When Formulating Their Defense Strategy

In the Petition, petitioner urged this Court to grant certiorari to decide the split in the federal circuit courts over when defense counsel may rely on expert mental health opinions when formulating trial strategy. Petitioner noted that decisions by the Fourth and Eighth Circuits had held that an attorney does not render ineffective assistance by failing to "shop around" for a favorable expert opinion and specifically rejected claims that an attorney may not rely on a psychiatric evaluation even where the expert does not administer various psychological tests. The Ninth Circuit created a split with these decisions by finding that defense counsel were not objectively reasonable in relying on the opinions of two psychiatrists, Dr. Oliver and Dr. Phillips, when formulating their defense strategy. (Pet. at 15-17.)

Daniels does not contest that the Ninth Circuit decision creates a split among the circuit courts. Indeed, he does not even mention the cases cited by petitioner holding that an attorney may reasonably rely on a psychiatric evaluation. Instead, Daniels maintains that because trial counsel did not obtain various social, medical, and legal records, they could not make informed decisions on trial strategy. (Resp.'s Opp. at 21-

25.) Daniels puts the cart before the horse. He overlooks that neither of the psychiatrists suggested that additional records, documents, history, or tests were necessary before he could render his opinion. Given the finite amount of time and resources available to counsel, the decision not to waste time pursuing such materials was reasonable based on the evidence available to trial counsel at the time, and the lack of any indication that they should obtain further testing. *See Burger v. Kemp*, 483 U.S. 776, 794 (1987) ("counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment.")

More to the point, in rejecting petitioner's argument that counsel reasonably relied on the opinions of the two psychiatrists, the Ninth Circuit did not assert, as does Daniels now, that counsels' reliance was unreasonable because *counsel* did not have the various records to which Daniels points. Rather, the Ninth Circuit found that counsels' reliance on the experts was unreasonable because counsel should have known the opinions could not be trusted:

> Contrary to the State's suggestion, [lead counsel] had every reason to doubt Oliver's conclusions, as he was aware that Oliver had not been able to examine Daniels because of Daniels's refusal to cooperate. Nothing in Oliver's letter indicates that he evaluated Daniels's medical, social, educational, or criminal records or that he conducted *any* medical or psychological testing to assess Daniels's mental state. Similarly, Phillips's letters contain no evidence that he conducted any testing, evaluation procedures, or structured assessment of Daniels's mental state.

Pet. app. at 38-39, n. 28. The problem with this conclusion, which Daniels does not address, is that it turns trial counsel into an *Über*-psychologist who must know more than the experts he retains. The Fourth and Eighth Circuits have rejected precisely such a requirement for constitutionally-effective assistance under the Sixth Amendment. *See, e.g., Walls v. Bowersox*, 151

F.3d 827, 835 (8th Cir. 1998) ("It was entirely reasonable for counsel to rely on the conclusion of two trained psychiatrists that no additional testing was warranted."); *Six v. Delo*, 94 F.3d 469, 474 (8th Cir. 1996) ("Dr. Daniel's report did not recommend any further examination and we cannot say his findings would suggest to a competent lawyer that further evaluation was necessary."); *Poyner v. Murray*, 964 F.2d 1404, 1418 (4th Cir. 1992) (rejecting assertion that trial counsel were ineffective because mental health experts failed to perform certain tests, court observed claim was directed not to the performance of counsel, but rather to the performance of the experts, and there is no right to effective assistance of experts). Daniels does not challenge the conflict created with these decisions.[2]

Daniels attempts to compare the present case to *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). Resp.'s Opp. at 11-12, 22. Neither case is apposite. In *Wiggins*, defense counsel failed to investigate the defendant's life history or family background. This Court found defense counsel did not conduct a reasonable investigation when they failed to expand their investigation beyond a presentence investigation report and department of social services records. While counsel had the defendant evaluated by a psychologist, his opinions did not reveal anything about the defendant's bleak life history. *Wiggins*, 539 U.S. at 523. Consequently, unlike the present case, the expert's opinion did not furnish any reasonable basis for not conducting further investigation. Here, in contrast to *Wiggins*, the opinions of Dr. Oliver and Dr. Phillips related directly to the allegedly deficient

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2. It should be noted that Daniels does not challenge petitioner's assertions regarding the factual inaccuracies of the Ninth Circuit's opinion concerning Dr. Oliver's alleged failure to speak with Daniels, defense counsels' supposed belief that Daniels suffered from mental illness, and defense counsels' failure to follow up on Dr. Banks's preliminary examination – which was not revealed to counsel until after the guilt phase was completed. *See* Pet. at 13-19.

investigation into Daniels's mental illness. Unlike *Wiggins*, the question whether defense counsel could rely on the opinions of these experts when formulating their strategy is thus squarely presented.

For similar reasons, *Rompilla* also does not support Daniels's position. As petitioner previously noted in the petition (Pet. at 19 n. 6), the present case does not involve trial counsel's failure to review materials they knew, or should have known, the prosecution would rely upon as aggravating evidence. While Daniels's trial counsel did not obtain certain hospital records, they had no reason to believe the prosecution would rely upon such documents, nor did they have any reason to believe such records would be useful to the defense case in light of the unqualified opinions of the two experts. This distinction with *Rompilla* is particularly noteworthy given the Ninth Circuit's conclusion that defense counsel's performance was inadequate at both the penalty phase *and* the guilt phase. In his Opposition, Daniels simply parrots the Ninth Circuit's reliance on *Rompilla*, but makes no response to petitioner's arguments.

The question whether defense counsel rendered ineffective assistance in failing to further investigate Daniels's asserted mental illness after they relied on the opinions of two psychiatrists that he lacked any mental illness is directly presented. Certiorari must be granted to decide the conflict among the circuit courts as to whether, in order to provide the minimum level of competence required by the Constitution, counsel must be required to second guess the adequacy of such expert opinions based upon asserted deference in the expert's testing and evaluation procedures.

### C. *Certiorari Must Be Granted To Prevent The* Ninth Circuit's Erosion Of This Court's Decisions In *Murphy v. Florida* And *Brown v. Sanders* Concerning Venue And Invalid Sentencing Factors

Daniels effectively concedes that issues three and four, concerning the change of venue and failure to instruct the jury not to double count redundant special circumstances, are both worthy of certiorari. He makes no effort to defend the Ninth Circuit's opinion regarding either issue. Specifically, Daniels does not contest that the standard employed by the Ninth Circuit to determine whether prejudice must be presumed from the failure to grant a change of venue motion is contrary to decisions by this Court in failing to consider the jurors' responses during voir dire. Nor does he dispute that the Ninth Circuit's finding of prejudice based on the trial court's failure to instruct the jury regarding the superfluous multiple murder special circumstance stands to undermine this Court's decision in *Brown v. Sanders*, 546 U.S. 212 (2006). Instead, Daniels asserts that the Ninth Circuit's rulings on both of these issues were only part of its consideration of cumulative error, and not the basis for the Ninth Circuit's "essential ruling." (Resp.'s Opp. at 25-26.)

Daniels evidently misses the point. The Ninth Circuit has thumbed its nose at controlling precedent by this Court. The Ninth Circuit cannot insulate its rulings from review by hiding under the rubric of "cumulative error." The court went out of its way to find a separate violation of due process based on the failure to grant a change of venue. (Pet. app. at 47a-50a.) Similarly, the court found a separate due process violation based on the overlapping special circumstances. (Pet. app. at 50a-54a.) Regardless of whether these asserted errors by themselves would have been sufficient to warrant reversal of all or part of

the judgment in the present case,[3] the point remains that the Ninth Circuit has issued a published decision undermining this Court's established precedent. Certiorari must be granted to correct this disregard for this Court's decisions.

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3. Daniels chides petitioner for not mentioning that the Ninth Circuit's venue ruling applied only to the penalty phase. Resp.'s Opp. at 25. He is simply mistaken. *See* Pet. at 6-7. More importantly, he fails to reveal why he believes the limitation of the holding to the penalty phase is of "key importance." The Ninth Circuit limited its holding only because Daniels did not properly present the venue claim as to the guilt phase; the Ninth Circuit nevertheless observed that "the same publicity that tainted the penalty phase would also have infected the guilt phase. . . ." Pet. App. 50 n. 31. Future courts relying on the Ninth Circuit's aberrant reasoning regarding the presumption of prejudice from pre-trial publicity will presumably not be similarly limited.

## CONCLUSION

Accordingly, for the reasons stated above, petitioner respectfully requests that this Court grant certiorari in this case.

Dated: April 25, 2007

Respectfully submitted,

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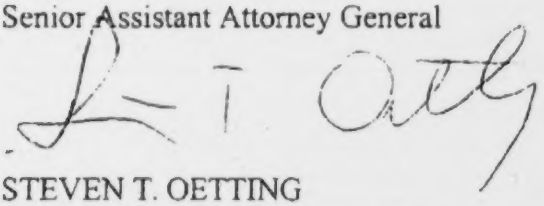

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